Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

MARIO JIMENEZ,

Petitioner,

v.

HIALEAH HOUSING AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Court of Appeals' dismissal for want of prosecution of a party's timely-filed appeal based upon his counsel's failure to file the brief until seven days past the deadline, given counsel's debilitating catastrophic illness that caused him to be briefly hospitalized and bedridden in the days immediately prior to the deadline, and where the opposing party was not prejudiced by the short delay, conflict with precedent in other circuits and in this Court that an appeal should not be dismissed for counsel's failure to file the brief on time where counsel has experienced extraordinary and compelling personal circumstances?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Mario Jimenez, appellant/plaintiff below, and the Hialeah Housing Authority, a political subdivision of the City of Hialeah, Florida, appellee/defendant below.

Petitioner Mario Jimenez respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") in the case of *Mario Jimenez, Appellant v. Hialeah Housing Authority*, Case No: 00-12139-C.

OPINIONS BELOW

The Court of Appeals' decision, which was rendered without an opinion on October 5, 2000, is not reported.

The Court of Appeals denied Petitioner's motion to set aside its Clerk's entry of dismissal for want of prosecution and to reinstate Petitioner's timely-filed appeal from the district court's summary final judgment.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was rendered final on October 5, 2000 when it denied Petitioner's motion for reconsideration, which was expressly construed by the Court of Appeals as a motion to reinstate the appeal that was dismissed by its Clerk for want of prosecution for failure of Petitioner's counsel to file his brief on time.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The fundamental question in this case is whether the decision of the Court of Appeals to dismiss Petitioner's timely-filed appeal for failure of his counsel to file his brief on time, where Petitioner attempted to file the brief seven days past the deadline, given his counsel's extraordinary and compelling personal circumstances, and where Respondent was not prejudiced by the short delay, conflicts with precedent in other circuits and in this Court.

Petitioner was a litigant under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.*, and other federal and state laws. The original jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331. The district court granted summary final judgment dismissing all of Petitioner's claims.

Petitioner timely appealed the summary final judgment to the Court of Appeals. The Court of Appeals granted Petitioner one extension of thirty days to file his brief based upon his counsel's illness.

Thereafter, Petitioner's brief became due on July 6, 2000. On or about July 1, 2000, Petitioner's counsel became seriously ill with the sudden recurrence of symptoms of acute Hepatitis B and chronic liver disease with which he had been diagnosed earlier that year. Petitioner's counsel was briefly hospitalized and bedridden during July 1-6, 2000.

Upon returning to his office on July 6, 2000, Petitioner's counsel failed to request from the Court of Appeals an additional extension to file the brief. Instead, he attempted to file the brief, record excerpts and a motion for leave to file Petitioner's brief out of time with the Court of Appeals on July 13, 2000.

The Clerk of the Court of Appeals dismissed Petitioner's appeal for want of prosecution on July 26, 2000 after receiving Petitioner's brief, record excerpts and motion. A panel decision denying Petitioner's motion for reconsideration, expressly construed by the Court of Appeals as a motion to reinstate Petitioner's appeal, was filed October 5, 2000.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' dismissal of Petitioner's appeal for want of prosecution for his counsel's failure to file the brief on time, where Petitioner attempted to file the brief just seven days

past the deadline, given counsel's extraordinary and compelling circumstances (sudden recurrence of symptoms of acute Hepatitis B and chronic liver disease that caused Petitioner's counsel to be briefly hospitalized and bedridden in the days immediately prior to the deadline) and where Respondent was not prejudiced by the short delay, conflicts with precedent in other circuits and in this Court.

Courts throughout the United States of America have consistently held that appeals should be decided, if at all possible, on the merits and that a decision on the merits should not be avoided on the basis of mere technicalities. *Jones v. Chaney & James Const. Co.*, 399 F.2d 84 (5th Cir. 1968); *Foman v. Davis*, 371 U.S. 178, 181, 83 S. Ct. 227, 230, 9 L. Ed. 222, 225 (1962); *Morrison v. Texas Co.*, 289 F.2d 382 (7th Cir. 1961).

In determining appropriate sanctions against an appellant who fails to strictly observe briefing deadlines, the courts usually look at whether an appellee has been prejudiced. *Tidwell v. Dees*, 464 F.2d 1297 (5th Cir. 1972).

Here, without any showing that the Respondent was prejudiced as a result of Petitioner's late filing of his brief, the Court of Appeals dismissed Petitioner's appeal when his counsel attempted to file the brief seven days past the deadline.

However, both the Third Circuit and, by implication, this Court have held that an appeal should not be dismissed for counsel's failure to file the brief on time where counsel has experienced extraordinary and compelling personal circumstances. *Matute v. Procoast Navigation, Ltd.*, 928 F.2d 627 (3d Cir. 1991), *cert. denied*, 502 U.S. 919, 116 L. Ed. 270, 112 S. Ct. 329 (1991).

The serious illness of Petitioner's counsel was well documented. He had been diagnosed with acute Hepatitis B

and chronic liver disease in March of 2000, rendering him temporarily disabled. As of June of 2000, his catastrophic illnesses appeared to be in remission and/or his symptoms had abated. Believing that he would be able to complete Petitioner's brief by the July 6, 2000 deadline, Petitioner's counsel did not request an additional extension from the Court of Appeals before the deadline.

However, on or about July 1, 2000, Petitioner's counsel experienced a sudden recurrence of his symptoms that caused him to be briefly hospitalized and bedridden during July 1-6, 2000. Upon returning to his office on July 6, 2000, Petitioner's counsel (a sole practitioner) failed to request an additional extension to file the brief from the Court of Appeals.

Instead, on July 12, 2000, Petitioner's counsel "overnighted" the brief, record excerpts and a motion for leave to file those papers out of time to the Court of Appeals which received them on July 13, 2000.

Thereafter, the Clerk of the Court of Appeals entered a dismissal of Petitioner's appeal for want of prosecution for his counsel's failure to file the brief and record excerpts on time. Petitioner's motion for reconsideration, which was construed by the Court of Appeals as a motion to reinstate the appeal, was denied on October 5, 2000.

This case is legally and factually apposite to *Matute* where the Third Circuit held that an appeal should *not* be dismissed for counsel's failure to file a brief on time where appellant's counsel has experienced extraordinary and compelling personal circumstances akin to those present here. Thus, the Court of Appeals' decision in this case directly conflicts with the Third Circuit's opinion in *Matute*.

Similarly, other courts have held that counsel may be sternly criticized for not filing a timely brief and for possibly prejudicing

the rights of his client, but that the failure to file a timely brief is not a jurisdictional bar to hearing the appeal. *Marcaida v. Rascoe*, 569 F.2d 828 (5th Cir. 1978).

If it appears that a party is attempting to prosecute the appeal diligently, as Petitioner in this case had done prior to attempting to file his brief with the Court of Appeals (and since then), a failure to request an extension of time to file a brief should not automatically result in the dismissal of the appeal. *King v. Laborers International Union*, 443 F.2d 272 (6th Cir. 1971).

Moreover, Federal Rule of Appellate Procedure 31 recognizes that, while briefs must be filed within 40 days after the record on appeal is filed, the failure to file a brief on time is not a jurisdictional bar. *See Marcaida*, *supra*.

CONCLUSION

This case presents a question of significant importance — whether the Court of Appeals' peremptory dismissal of Petitioner's meritorious appeal for want of prosecution for his counsel's excusable failure to file a brief on time, where Petitioner attempted to file the brief seven days past the deadline, given his counsel's extraordinary and compelling personal circumstances, and where Respondent was not prejudiced by the short delay, conflicts with the Third Circuit's opinion in *Matute* and precedent in other circuits. In dismissing Petitioner's appeal, the Court of Appeals departed from established precedent in other circuits (and, by implication, in this Court) and deprived Petitioner of his constitutional right of appellate review.

Accordingly, Petitioner respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION TO REINSTATE APPEAL DATED AND FILED OCTOBER 5, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-12139-CC

MARIO JIMENEZ,

Plaintiff-Appellant,

versus

THE HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE: EDMONDSON and WILSON, Circuit Judges.

Appellant's Motion for Reconsideration of this Court's August 10, 2000 order denying Appellant's motion to set aside the clerk's dismissal and remedy default, which is construed as a Motion to Reinstate this Appeal, is DENIED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION TO REINSTATE APPEAL DATED AND FILED AUGUST 10, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-12139-CC

MARIO JIMENEZ,

Plaintiff-Appellant,

versus

THE HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

ORDER:

Appellant's Motion to "Set Aside Dismissal and Remedy Default", construed as a motion to reinstate the appeal, is denied.

s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

APPENDIX C — ENTRY OF DISMISSAL OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JULY 26, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-12139-CC

MARIO JIMENEZ,

Plaintiff-Appellant,

versus

THE HIALEAH HOUSING AUTHORITY,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District Of Florida

ENTRY OF DISMISSAL

Pursuant to 11th Cir.R.42-2(c), this appeal is hereby dismissed for want of prosecution because appellant has failed to file an appellant's brief and record excerpts within the time fixed by the rules, effective this 26th day of July, 2000.

Appendix C

THOMAS K. KAHN
Clerk of the United States Court
of Appeals for the Eleventh Circuit

By: Jenifer Alexander
Deputy Clerk

FOR THE COURT —
BY DIRECTION

APPENDIX D — ORDER AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION DATED MARCH 21, 2000 AND FILED MARCH 22, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 98-2779-CIV-DAVIS/BROWN

MARIO JIMENEZ,

Plaintiff,

v.

HIALEAH HOUSING AUTHORITY,

Defendant.

ORDER

THIS MATTER is before the Court on Defendant Hialeah Housing Authority's ("Defendant") Motion for Final Summary Judgment (filed November 29, 1999), to which Plaintiff has responded, Defendant replied, and Plaintiff has submitted a sur-reply brief.

I. BACKGROUND

Plaintiff Mario Jimenez ("Plaintiff") filed a Complaint on November 17, 1998, alleging civil rights violations under

the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA") (Count I); the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA") (Count II); the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.* ("FMLA") (Count III); due process violations pursuant to 42 U.S.C. § 1983 (Count IV); and violation of the Florida Whistleblower Act, Florida Statutes § 112.3187 (Count V).

Plaintiff is a fifty-eight year old Hispanic male. *See* Complaint ¶ 4. Defendant is a quasi-governmental entity existing under the laws of the State of Florida that provides low-income housing to disadvantaged and elderly residents of Hialeah. Plaintiff was employed by Defendant from October 29, 1979 until June 5, 1998 when he was discharged. *See id.* at ¶ 13, 30.

Defendant's Board of Commissioners, an exclusive body with authority to adopt or implement policies on behalf of Defendant, typically appoints an executive director to operate Defendant's day-to-day business. *See* Roca Aff. ¶ 2,3. Maria Roca ("Roca") is executive director for Defendant and was serving in this capacity when Plaintiff was terminated. *See id.* at ¶ 1.

On January 16, 1996, Plaintiff and approximately fifty-five (55) of Defendant's other employees sent a letter to the U.S. Department of Housing and Urban Development (the "HUD letter"), in which they objected to various acts of alleged political favoritism, corruption, and unfair treatment of Richard Fusaro, a co-worker employed by Defendant. *See* Complaint, ¶ 15.

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On January 6, 1998, almost two years later, Plaintiff received an evaluation indicating his job performance needed improvement in eight of ten areas. *See* Def. Depo. Exh. 27. Plaintiff was suspended for five days without pay on January 8, 1998. *See* Def. Depo. Exh. 23. In a letter attached to Plaintiff's grievance complaint based upon the suspension, Plaintiff stated he had been suspended due to his "support and friendship to Mr. Richard Fusaro." *See* Def. Depo. Exh. 25. Plaintiff also alleged that he was subjected to the suspension in retaliation for his participation in the HUD letter. *See* Complaint ¶ 25; Plaintiff's Depo, p. 12-13. More specifically, Plaintiff testified in his deposition that the suspension was in retaliation against him for having signed the HUD letter, for his failure to campaign for Mayor Raul Martinez, and because he testified before a grand jury in a matter related to Defendant's former director, Rafael Sanchez. *See* Plaintiff's Depo, p. 99-100.

Plaintiff also testified that he believed he was discriminated against because of his age and replaced by a younger person because he had heard someone refer to him as "viejo" or old guy. *See id.* at 33-34. Plaintiff, however, stated he could not remember who made the remark about age and only assumed it was directed at him. *See id.* at 36-38. Plaintiff could recall no other evidence supporting his allegations of age discrimination. *See id.* at 33-34.

Sometime in the fall of 1997, due in large part to work-related stress and hostility, Plaintiff suffered from depression and anxiety. *See* Complaint, ¶ 20-22. Plaintiff alleges that this depression and anxiety rendered him disabled under the Americans With Disabilities Act and that he had to take

medical leave from work based upon his condition. In the weeks following his return to work, Plaintiff alleges he suffered discriminatory treatment and was suspended because of his medical condition, his disability, and/or his taking time off from work. *See id.* at ¶ 23-25. Plaintiff also alleges that he was ultimately fired in June 1998 after returning from a second medical leave. Plaintiff, however, has admitted that he has no evidence that he was discharged based on a "disability" or his taking medical leave other than his receiving a poor evaluation after taking medical leave and receiving numerous performance-related memos from Roca. *See* Plaintiff Depo, p. 43-44.

On June 4, 1998, Roca delivered to Plaintiff a letter advising him that she was considering his termination based on his work performance. *See* Def. Depo. Exh. 36, On June 5, 1998, Roca and Plaintiff met to discuss Plaintiff's imminent termination, and following the meeting, Roca gave Plaintiff his notice confirming termination and advising him of his grievance rights. *See* Def. Depo. Exh. 38.

Plaintiff filed a Charge of Discrimination ("EEOC charge") with the Equal Employment Opportunity Commission ("EEOC") on June 10, 1998, alleging violations of the ADA and ADEA. *See* Def. Depo. Exh. 1. Specifically, he claimed he was terminated and suspended based on his age and/or purported disability. The EEOC issued Plaintiff a right to sue letter on August 19, 1998. Thereafter, Plaintiff filed this suit in November 1998.

Appendix D

Defendant argues that it is entitled to final summary judgment on Plaintiff's discriminatory discharge claims in Counts I and II[1], and on Counts III through VI in their entirety.

II. DISCUSSION

A. Standard of Review

A moving party is entitled to summary judgment only where no genuine issue of material fact exists and the party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). On a motion for summary judgment, a court must view all the evidence in a light most favorable to the non-moving party. *See Samples ex rel. v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). All reasonable doubts as to the facts are to be resolved in favor of the party opposing summary judgment. *See United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1988). If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, the court should not grant summary judgment. *See Augusta Iron and Steel Works v. Employers Ins. of Wasau*, 835 F.2d 855, 856 (11th Cir. 1988).

While the burden on a party seeking summary judgment is great, the opposing party has a duty to present affirmative

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1. The Court previously entered partial summary judgment in favor of Defendant with respect to Count I's claims of harassment and hostile environment and Count II's claims for retaliation. *See* Court's Order of December 6, 1999.

evidence in order to defeat a properly supported motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). A mere sliver of evidence in favor of the party opposing the motion, or evidence that is merely colorable or not significantly probative is insufficient to defeat a properly supported motion. *Id.*

B. The Merits

1. *Burden of Proof*

The Court notes as an initial matter that the burden of proof for Plaintiff's claims under the ADA, ADEA and FMLA are governed by the burden shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Graham v. State Farm Mutual Ins. Co.*, 193 F.3d 1274, 1282 (11th Cir. 1999). Initially, the plaintiff must establish a prima facie case of discrimination. Once plaintiff establishes a prima facie case, a presumption of discrimination arises. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). Thereafter, the defendant can rebut the presumption of discrimination by producing a legitimate, nondiscriminatory reason for its actions. *Id.* This burden is exceedingly light, and the defendant need only proffer legitimate reasons, not prove them. *See Meeks v. Computer Assoc. Int'l.*, 15 F.3d 1013 (11th Cir. 1994). Once such reason is proffered, the plaintiff must then demonstrate that the reasons were simply a pretext and the defendant had a discriminatory intent. Plaintiff, however, is required at this point to provide additional evidence that discredits the employer's reasons in order to survive summary judgment. A mere scintilla of evidence in support of Plaintiff's position

will not create a jury question. *See Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 444 (11th Cir. 1996).

a. *Violations of the ADA*

First, Defendant contends it is entitled to summary judgment on Plaintiff's claims that he was terminated in violation of the ADA. In order to establish a prima facie case of disability discrimination, Plaintiff must demonstrate that he (1) is disabled;[2] (2) is qualified for the position in question; and (3) was subjected to unlawful discrimination because of his disability. *See* 42 U.S.C. § 12112(a); *Hilburn*, 181 F.3d at 1223.

After reviewing all of the evidence in this case, the Court concludes that Plaintiff has failed to demonstrate by preponderance of the evidence that he is disabled under the ADA. In fact, Plaintiff has not provided a single piece of evidence supporting his contention that he is disabled, apart from his own affidavit stating he was diagnosed as having depression and took medical leave as a result. While

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2. The ADA defines disability as (A) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (B) a record of such impairment; or (C) being regarded as having such impairment. *See* 42 U.S.C. § 12102(2). In evaluating whether an impairment substantially limits a major life activity, a court should consider: 1) the nature and severity of the impairment; 2) the duration of expected duration of the impairment; 3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. *See* 29 C.F.R. § 1630.2.

depression can be a "serious and potentially tragic illness," it exists in degrees. *See Pritchard v. Southern Company Services*, 92 F.3d 1130, 1133 (11th Cir. 1996). The fact that Plaintiff may have suffered from depression, in and of itself, does not render him disabled under the ADA. *See id.*

Plaintiff has failed to demonstrate that his depression substantially limited his major life activities. Instead, the evidence suggests that he was simply unable to work at his particular job and/or for Maria Roca, his supervisor. Plaintiff's own affidavit provides: "largely because of work-related stress and hostility to which I was being subjected, I was medically diagnosed with severe depression and anxiety. . ." *See* Plaintiff Aff. ¶ 6. In his deposition testimony, Plaintiff stated that "[w]hat made me sick was the Housing Authority and Mrs. Maria Roca and Mr. Raul Martinez." *See* Plaintiff Depo., p. 82. There is no evidence that Plaintiff suffered from depression before or after the time he worked under Roca. *See* Scholz-Rubin Depo., p. 13. Instead, Plaintiff stated in his deposition that working under Roca was his primary problem and that he was only depressed during the time when Roca was allegedly harassing him at work. *See* Plaintiff Depo, p. 42, 76-78. Plaintiff also revealed that he no longer needs treatment for depression because "after [he] left the Housing Authority, [he] started to feel better" and was working in a much better environment. *See id.* at 76-78.[3]

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3. Plaintiff's doctors similarly suggest that Plaintiff's problems stemmed from his particular job and from working under Roca. Dr. Scholz-Rubin stated in her deposition that Plaintiff was depressed as a result of his job, and particularly his problems with a female

(Cont'd)

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An employee's depression and anxiety caused by working with a particular co-worker or supervisor is not disabling under ADA. *See Palmer v. Circuit Court of Cook County, Illinois*, 117 F.3d 351, 352 (7th Cir. 1997) (personality conflict with supervisor does not constitute disability even if it produces anxiety and depression); *Siemon v. AT&T Corp.*, 117 F.3d 1173, 1176 (10th Cir. 1997) (employee's depression brought on by working for a particular supervisor does not prevent employee from performing class of jobs or broad range of jobs in various classes); *Palelogos v. Rehab. Consultants, Inc.*, 990 F. Supp. 1460, 1464 (N.D. Ga. 1998) (stress, anxiety, and depression resulting from plaintiff's job and interaction with supervisors is not sufficient to constitute a disability). Because Plaintiff's depression in the instant case existed over the course of only a few months and coincided with stress relating to his particular job situation and his work for Roca, the Court concludes that there is no genuine issue of fact as to whether Plaintiff was disabled. Accordingly, Plaintiff has failed to establish his prima facie case and summary judgment on his ADA claims is granted.

(Cont'd)

supervisor. *See* Scholz-Rubin Depo., p. 8-14. Another doctor who treated Plaintiff concluded that Plaintiff suffered from an adjustive disorder where all individual exhibits a number of symptoms as a result of a particular stressful situation. In Plaintiff's situation, his symptoms were brought about by problems at his job and with his supervisor. *See* Rodriguez Depo., p. 11 A third doctor who examined Plaintiff noted that Plaintiff appeared anxious and depressed about work, but stated that he was unaware of any activities which Plaintiff could not do because of his depression. *See* Dr. Garcia-Romeu Depo., p. 8-9, 11-12, 14.

Furthermore, even if the Court assumed that Plaintiff met each of his prima facie burdens under the ADA, summary judgment would still be appropriate. Defendant has provided numerous legitimate, non-discriminatory justifications for suspending and firing Plaintiff. For instance, several affiants indicated that Plaintiff often failed to properly address issues that arose for Defendant's tenants and allowed numerous letters and phone calls from tenants to go unanswered. *See* Mursuli, ¶ 3; Binelo Aff. ¶ 3. In addition, HUD's Inspector General recommended that a program under Plaintiff's supervision be reviewed due to a large number of errors and problems with the program. *See* Plaintiff's Depo., p. 111-112. Plaintiff also concedes that he failed to complete certain assignments as instructed by his supervisor. *See* Plaintiff Depo., p. 125-129. Numerous employees complained or offered testimony that Plaintiff routinely yelled and treated employees in an abusive and unprofessional manner. *See* Roca Aff. ¶ 6; Binela Aff. ¶ 4; Gutierrez Aff. ¶ 2; Mursuli Aff. ¶ 4; and Garcia Aff. ¶ 3. There is also evidence that Plaintiff made threats that he would "take a bunch of you with me" if he was fired. *See* Mursuli Aff. ¶ 6. Plaintiff has offered no evidence other than his own affidavit to demonstrate that the Defendant's reasons for suspending or discharging him were pretextual for disability discrimination. Plaintiff's conclusory allegations that he believes he was subjected to discrimination are simply insufficient to raise an inference of discrimination in the face of legitimate, non-discriminatory justifications by his employer. *See Terrell v. USAir*, 132 F.3d 621, 625 (11th Cir. 1998).

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b. *Violations of the ADEA*

A plaintiff establishes a prima facie case of age discrimination by demonstrating: (1) he was a member of a protected class of person between age forty and seventy; (2) he was qualified for the position he held; (3) he was subject to an adverse employment action; and (4) that a substantially younger person filled his position. *See Turlington v. Atlanta Gas & Light Co.*, 135 F.3d 1428, 1432 (11th Cir.), *cert. denied*, 119 S. Ct. 405 (1998). Even assuming arguendo that Plaintiff has established a prima facie case of age discrimination, summary judgment is appropriate because Plaintiff has provided no evidence to show that the legitimate, non-discriminatory justifications for firing Plaintiff discussed in the previous section were pretext for age discrimination.

Plaintiff cannot simply rely on his argument that he was replaced by a younger person to show pretext because that is part of his prima facie case. As noted previously, when confronted with a legitimate, non-discriminatory justification for an employment action, a Plaintiff must come forward with additional facts to allow a jury to find that the defendant's proffered reasons were pretextual. *See Tidwell v. Carter Products*, 135 F.3d 1422 (11th Cir. 1998). When asked what additional evidence Plaintiff had that he was discharged because of his age, Plaintiff stated that he overheard someone call him "viejo," which translates to "old guy." *See* Plaintiff's Depo., p. 33-37. Nevertheless, Plaintiff was unable to identify who called him "viejo" and only assumed that the speaker was referring to Plaintiff. *See* Plaintiff's Depo., p. 33-37. Plaintiff admitted that he had no other evidence to support his claim for age discrimination. *See* Plaintiff's Depo., p. 42.

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Plaintiff's allegations are insufficient as a matter of law to support his claim for discrimination under the ADEA. *See Early v. Champion Int'l. Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990) (evidence that is merely colorable or not significantly probative is insufficient to withstand a properly supported motion for summary judgment). Accordingly, summary judgment is appropriate.

c. *Violations of the FMLA*

Count III of the Plaintiff's Complaint sets forth allegations that Defendant violated the FMLA. There are two types of claims that can be maintained under the FMLA. First, an employee has an interference claim when an employer burdens or outright denies substantive statutory rights to which the employee is entitled under the FMLA. *See O'Connor v. PCA Family Health Plan, Inc.*, 2000 WL 33166, *2 (11th Cir. 2000) (*citing* 29 U.S.C. § 2615(a)(1)). Second, an employee may raise a retaliation claim he or she is discharged or discriminated against for exercising his rights under the FMLA. *See id.* Because Plaintiff's Complaint does not specify which type of claim he is pursuing, the Court addresses whether Plaintiff has raised a genuine issue of material fact as to either. *See id.* (district court erred in not considering both types of FMLA claims in considering whether employer violated FMLA).

i. FMLA Interference Claim

First, the Court addresses Plaintiff's claim for interference under the FMLA. To prevail on an interference claim, an employee must prove by preponderance of the

evidence that he or she is entitled to the benefit she claims and that an employer interfered with or denied that benefit. *See O'Connor v. PCA Family Health Plan, Inc.*, 2000 WL 33166 (11th Cir. 2000). The Eleventh Circuit has recognized that denial of reinstatement following an employee's leave of absence can form the basis of an interference claim. *See id.* at *3.

Plaintiff claims that he was denied this statutory right to reinstatement upon his attempt to return from leave on June 2, 1998. *See* Plaintiff's Aff. ¶ 14. In support, Plaintiff offers only his conclusory affidavit stating that he attempted to return to work on June 2, but was not permitted to do so. Defendant counters that Plaintiff was, in fact, reinstated on June 1, 1998. In support, Defendant has provided its payroll records reflecting that Plaintiff was paid for the entire week of June 1, 1998 through June 5, 1998. *See* Vallardes Aff. ¶ 3. In addition, Defendant offers the Plaintiff's supervisor's affidavit stating that Plaintiff returned to work on June 1, 1998. *See* Roca Supp. Aff. ¶ 2.

The Court concludes that Plaintiff has failed to raise a genuine issue of fact as to whether he was denied his right to reinstatement under the FMLA. Plaintiff cannot merely rest on his affidavit's conclusory allegations to defeat Defendant's properly supported summary judgment motion. *See Terrell*, 132 F.3d at 625 (conclusory allegations lacking corroboration will not defeat a motion for summary judgment); *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 962 (4th Cir. 1996) (stating summary judgment affidavits cannot be conclusory, and self-serving opinions without corroboration are not significantly probative).

Furthermore, even if Plaintiff had raised an issue of fact as to whether he was reinstated, be apparently suffered no harm from any alleged denial of his right to reinstatement because he received his entire twelve weeks of medical leave and was paid in a manner consistent with having been reinstated on June 1, 1998. *See Graham*, 193 F.3d at 1275 (plaintiff has no FMLA injury when he receives all of the leave he requests); *O'Connor*, 2000 WL 33166 at *6. Because the Court concludes that Plaintiff has failed to raise a genuine issue of fact on his claim that Defendant interfered with his rights under the FMLA, summary judgment in favor of Defendant is appropriate.[4]

ii. FMLA Retaliation Claim

Next, the Court addresses Plaintiff's allegation that his discharge was discriminatory and/or retaliatory for his having exercised his rights under the FMLA. Plaintiff contends that

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4. As further support for the legitimacy of its decision to fire Plaintiff after his reinstatement, Defendant again offers its numerous legitimate, non-discriminatory justifications for firing Plaintiff. Although Plaintiff correctly notes that Plaintiff need not prove discriminatory intent for an FMLA interference claim, Defendant's reasons for firing Plaintiff are relevant insofar as they suggest that Plaintiff would have been fired whether he had taken medical leave or not. *See Clark v. New York State Electric & Gas Corp.*, 67 F.Supp.2d 63 (N.D.N.Y. 1999) (FMLA does not entitle employee taking leave to any greater rights than if he not taken leave, and FMLA does not insulate an employee from performance deficiencies); *Clay v. City of Chicago Dept. of Health*, 143 F.3d 1092 (7th Cir. 1998) (employer did not violate FMLA by not reinstating employee when employer could have fired employee for performance reasons even if she had not taken leave).

he was expected back from his medical leave on June 2, 1998, but that Defendant refused to allow him back to work. Then, on June 5, 1998, Defendant terminated Plaintiff's employment with Defendant.

Congress clearly contemplated that retaliation and discrimination claims under the FMLA should be analyzed under the McDonnell Douglas burden shifting framework. *See Graham*, 193 F.3d at 1283. For purposes of this analysis, the Court assumes that Plaintiff has established a prima facie case of discrimination/retaliation under the FMLA.[5] Nevertheless, as discussed in the previous sections addressing Plaintiff's claims under the ADA and ADEA, Defendant has offered a legitimate, nondiscriminatory justification for terminating Plaintiff's position. Plaintiff has failed to rebut Defendant's explanation or to demonstrate that it was mere pretext for discrimination or retaliation under the FMLA.

When asked what evidence formed the basis of Plaintiff's claim that he was fired for taking medical leave, Plaintiff merely stated that he did not know, but maybe it was "because [he] was a sick person, because [he] took so many days." *See* Plaintiff's Depo., p. 84. Plaintiff also states that he received a letter telling him that he was only entitled to twelve

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5. To establish a prima facie case, a plaintiff must demonstrate that 1) he availed himself of a protected right under the FMLA; 2) he was adversely affected by an employment decision; 3) there is a causal connection between the protected activity and adverse employment action; and 4) he was qualified for his position at the time of the adverse employment action. *See Stanfield v. Answering Service, Inc.*, 867 F.2d 1290, 1293 (11th Cir. 1989).

weeks of medical leave. *See id.* at 86. Plaintiff offered no other testimony or evidence supporting his claim that he was discriminated against for taking medical leave. In fact, Plaintiff went on to say in his deposition that he thought that he was fired mainly because of his signing the HUD letter and speaking out in the office. *See id.* at 83-84.

Because Plaintiff has failed to offer any evidence that Defendant's reason for firing him was mere pretext for discrimination, Defendant is entitled to summary judgment on Plaintiff's claim that his discharge was discriminatory and retaliatory for his having exercised his rights under the FMLA.

d. *Violations of 42 U.S.C. § 1983*

Count IV of Plaintiff's Complaint alleges that Defendant violated 42 U.S.C. § 1983 by discharging Plaintiff in retaliation for Plaintiff having exercised his rights to freedom of speech and expression. Specifically, Plaintiff claims that Defendant retaliated against him for signing the HUD letter back in January 1996 that complained of fiscal mismanagement and political favoritism by certain of Defendant's employees. *See* Complaint, ¶ 62-64; Response to Summary Judgment Motion, p. 2-3. Plaintiff has failed to raise an issue of fact as to whether he is entitled to relief under 42 U.S.C. § 1983.

In order to establish a claim for retaliation under § 1983, Plaintiff must demonstrate that his participation in protected activity was the "substantial and motivating factor" in the Defendant's decision to terminate his employment. *See Watkins v. Bowden, Jr.*, 105 F.3d 1344, 1353 (11th Cir.

1997). This standard presupposes that the person who discharged Plaintiff knew that Plaintiff was engaged in protected activity. *See Raney v. Vinson Guard Service, Inc.*, 120 F.3d 1192 (11th Cir. 1997). If the individual who discharged Plaintiff did not know of Plaintiff's participation in protected activity, it is difficult to see how the participation would have been the substantial and motivating factor behind that individual's decision.

In the instant case, Ms. Roca, who ultimately discharged Plaintiff, testified under oath that she did not know of Plaintiff's participation in the HUD letter. *See* Roca Aff. ¶ 4. Plaintiff's February 7, 2000 affidavit does not contradict Roca's allegation that she was unaware of Plaintiff's participation in the HUD letter. Nor, as Plaintiff suggests, does the affidavit state that Roca threatened anyone who signed the HUD letter. Plaintiff has failed to cite to any other evidence in the record that raises an issue of fact as to whether Roca was aware that Plaintiff signed the HUD letter.[6]

Furthermore, even if Roca was aware that Plaintiff signed the HUD letter, Plaintiff has failed to raise an issue of fact as to whether that action motivated Roca's decision to discharge Plaintiff. More than 29 months elapsed between

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6. Plaintiff also argues that Roca's awareness of Plaintiff's participation in the HUD letter is evidenced by affidavit and deposition testimony submitted in a related case before Judge Moore, and that this Court should take judicial notice of such evidence. The Court, however, declines Plaintiff's invitation to dig through unspecified portions of the record in a separate case to find evidence to support Plaintiff's position in this case. Plaintiff was free to offer such evidence in support of his position and failed to do so.

the date he signed the letter and his ultimate discharge. This substantial lapse of time clearly factors against Plaintiff's argument that his participation in the HUD letter caused or motivated his discharge almost two and a half years later. *See Maniccia v. Brown*, 171 F.3d 1364 (11th Cir. 1999) (15-month lag time between plaintiff's grievance and alleged adverse employment action belies assertion that the former caused the latter); *O'Connor v. Chicago Transit Auth.*, 985 F.2d 1362, 1370 (7th Cir. 1993) (9-month gap between activity and adverse employment action precluded inference of causation); *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998) (13-month delay was too long for causation to be established).

Finally, Plaintiff has also failed to demonstrate that his alleged retaliatory termination for engaging in First Amendment activities occurred pursuant to a custom or policy of the Defendant. It is well established that a governmental entity cannot be held liable for violations of 42 U.S.C. § 1983 based upon respondeat superior. *See Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). On the contrary, government entities are only liable when their official policies cause their employees to violate another's constitutional rights. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988).

Plaintiff has offered no credible evidence that Defendant has any kind of custom or policy of retaliation against those who exercise free speech to criticize perceived abuses by Defendant or its employees. In fact, Plaintiff does not even respond to the portion of Defendant's Motion for Summary

Judgment addressing the clear lack of policy or custom.[7] Accordingly, summary judgment is appropriate on Plaintiff's claims for retaliatory discharge under 42 U.S.C. § 1983.

e. *Violation of Florida Statute § 112.3187*

Finally, Count V of Plaintiff's Complaint alleges that Plaintiff was discharged for his participation in the HUD letter in violation of Florida Statute § 112.3187 ("the Florida Whistleblower Act"). Defendant alleges that it is entitled to summary judgment on Plaintiff's Whistleblower claim because Plaintiff failed to disclose the purported protected information to the proper authorities.

Section 112.3187(6), Fla. Stat., provides that where a person reports alleged violations of the law by a local government entity, a plaintiff *must* disclose the information "to a chief executive officer as defined in § 447.203(9)[8] or an appropriate *local* official." There is no dispute that the

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7. In a related case, *Fusaro v. Hialeah Housing Authority*, 97-2732-CIV-MOORE (January 11, 1999), Judge Moore similarly concluded that there was no evidence that Defendant had a policy or custom of taking action against individuals who participated in the HUD letter or against individuals who exercised any other First Amendment rights.

8. A chief executive officer for a public employer is "the person, whether elected or appointed, who is responsible to the legislative body of the public employer for the administration of the governmental affairs of the public employer." Section 447.203(9), Florida Statutes. Legislative body means the governing body of an instrumentality or unit of government having authority to appropriate funds and establish policy. Section 447.203(10).

complaints raised in the HUD letter that Plaintiff participated in were directed at Defendant, a local government entity. Thus, the clear language of the Whistleblower Act requires that complaints or disclosures about the local entity be made to either a chief executive officer of Defendant's governing body or other appropriate *local* official.

The HUD letter, however, was not sent to any local individual or entity; rather, it was sent only to HUD, a federal agency. Plaintiff has offered no argument as to why the complaint to a federal agency satisfies the disclosure requirements of the Whistleblower Act. Because Plaintiff has failed to satisfy the reporting and disclosure requirements under the Florida Whistleblower Act, Plaintiff's claim must fail. *See Kelder v. ACT Corp.*, 650 So. 2d 647 (Fla. 5th DCA 1995) (plaintiff must disclose wrongdoing to appropriate officials). For all the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is GRANTED. This Case is CLOSED. The Clerk of this Court is directed to mark this case CLOSED. All pending motions not previously ruled on are DENIED as moot.

DONE AND ORDERED in Chambers, in Miami, Florida this 21st day of March, 2000.

s/ Edward B. Davis
EDWARD B. DAVIS
CHIEF UNITED STATES
DISTRICT JUDGE

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 98-2779-CIV-DAVIS/BROWN

MARIO JIMENEZ,

Plaintiff,

v.

HIALEAH HOUSING AUTHORITY,

Defendant.

FINAL JUDGMENT

THIS MATTER is before the Court on its own initiative. By separate Order this Court granted final summary judgment in favor of Defendant. Accordingly, it is

ORDERED AND ADJUDGED that **FINAL JUDGMENT** is entered in favor of Defendant Hialeah Housing Authority and against Plaintiff Mario Jimenez. Plaintiff is not entitled to any recovery.

LET EXECUTION ISSUE.

DONE AND ORDERED in Chambers, in Miami, Florida this 21st day of March, 2000.

s/ Edward B. Davis
EDWARD B. DAVIS
CHIEF UNITED STATES
DISTRICT JUDGE